

**BEFORE THE TENNESSEE REGULATORY AUTHORITY AT
NASHVILLE, TENNESSEE**

May 10, 1999

IN RE: APPLICATION OF ELECTRIC POWER)	
BOARD OF CHATTANOOGA FOR A)	
CERTIFICATE OF PUBLIC CONVENIENCE)	DOCKET NO. 97-07488
AND NECESSITY TO PROVIDE INTRASTATE)	
TELECOMMUNICATIONS SERVICE)	

**ORDER APPROVING APPLICATION FOR CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY**

On February 2, 1999, this matter came before the Tennessee Regulatory Authority ("Authority"), for consideration of the Application of Electric Power Board of Chattanooga ("EPB") for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Service (the "Application").

LEGAL STANDARD FOR GRANTING CCN

EPB's Application was made pursuant to and considered in light of the criteria for granting a certificate of public convenience and necessity ("CCN") as set forth in Tenn. Code Ann. § 65-4-201 et seq., Tenn. Code Ann. § 7-52-401 et seq. and Tenn. Code Ann. § 65-5-212.

Tenn. Code Ann. § 65-4-201 provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the

construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate. . .

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

In addition, pursuant to Tenn. Code Ann. § 65-5-212, competing telecommunications providers are required to file with the Authority: (1) a plan containing the providers' plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

Because EPB is a municipal electric service provider, EPB's Application is also subject to the requirements of Tenn. Code Ann. § 7-52-401 et seq. Tenn. Code Ann. § 7-52-401 provides, in pertinent part:

Every municipality operating an electric plant, whether pursuant to this chapter or any other public or private act or the provisions of the charter of the municipality, county or metropolitan government, has the power and is

authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services, or any other like system, plant, or equipment within and/or without the corporate or county limits of such municipality and, with the consent of such other municipality, within the corporate or county limits of any other municipality, in compliance with title 65, chapters 4 and 5, and all other applicable state and federal laws, rules and regulations. A municipality shall only be authorized to provide telephone, telegraph or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant. . . . Notwithstanding § 65-4-101 (a)(2) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, without limitation, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such municipality's provision of telephone, telegraph and communication services.

To avoid cross-subsidization problems among the telecommunications and electric divisions of a municipal electric company, Tenn. Code Ann. § 7-52-402 provides:

A municipality providing any of the services authorized by 7-52-401 shall not provide subsidies for such services. Notwithstanding the limitations set forth in the preceding sentence, a municipality providing such services shall be authorized to:

(1) Dedicate a reasonable portion of the electric plant to the provision of such services, the costs of which shall be allocated to such services for regulatory purposes; and

(2) Lend funds, at a rate of interest not less than the highest rate then earned by the municipality on invested electric plant funds, to acquire, construct, and provide working capital for the system, plant, and equipment necessary to provide any of the services authorized under 7-52-401; provided, that such interest costs shall be allocated to the cost of such services for regulatory purposes. Any loan of funds made pursuant to this section shall be approved in advance by the state director of local finance and shall contain such provisions as are required by the state director.

With respect to the applicability of other regulatory laws and rules to municipalities, Tenn. Code Ann. § 7-52-403 provides:

(a) To the extent that it provides any of the services authorized by § 7-52-401, a municipality has all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the state of Tennessee. To the extent that such authority and powers do not conflict with the provisions of title 65, chapter 4 or 5, and any rules, regulations, or orders issued thereunder, a municipality providing any of the services authorized by § 7-52-401 has all the authority and powers with respect to such services as are enumerated in this chapter.

Additionally, Tenn. Code Ann. § 7-52-405 establishes the criteria for a municipality's allocation of the costs of providing its telecommunications services.

INTERVENORS

Public notice of the hearing in this matter was made by the Authority's Executive Secretary, pursuant to Tenn. Code Ann. § 65-4-204. The following parties sought and were granted intervention: American Communications Services, Inc. ("ACSI"); AT&T Communications of the South Central States, Inc. ("AT&T"); BellSouth Telecommunications, Inc. ("BellSouth"); Consumer Advocate Division of the Attorney General's Office ("CAD"); MCI Telecommunications Corporation ("MCI"); NEXTLINK of Tennessee, L.L.C. (NEXTLINK"); Tennessee Cable Telecommunications Association ("TCTA"); and, Tennessee Power Company ("TPC").

EPB'S HEARING

At the hearing held on October 13, 1998,¹ Carlos C. Smith, William C. Carriger, and Mark W. Smith, of Strang, Fletcher, Carriger, Walker, Hodge & Smith PLLC, 400 Krystal

¹ A hearing was originally scheduled for December 2, 1997, however, upon EPB's request, the matter was continued and finally heard on October 13, 1998

Building, One Union Square, Chattanooga, Tennessee 37402 represented EPB. In addition, Harold Edward DePriest, President and Chief Executive Officer of EPB; Robert Nyswaner, Chief Financial Officer for Globe Telecommunications; Douglas A. Dawson, Principal of Competitive Communications Group; Rose M. Baxter, Vice President of the Accounting Division of EPB; and Ronald Fugatt, Vice President of EPB, were made available for presentation of testimony and examination by the Authority. Upon the conclusion of the hearing, the Authority requested and agreed that the submission of the most recently audited financial statements of Globe and ITC would be accepted as late-filed exhibits under protective order (proprietary agreement). Finally, the Authority requested the parties to brief the following legal issue: Whether Globe Telecommunications, Inc. ("Globe") is required to obtain a CCN to operate as a CLEC because of its ownership and operation of a switch in Tennessee? Pursuant to the Authority's request, the parties filed briefs addressing this issue on November 3, 1998.²

² Additionally, on November 3, 1998, EPB and TCTA filed the Proposed Conditions to which EPB should be subject to if it is granted a CCN. These conditions contain an agreement between EPB and TCTA on

- 1) the assignment and allocation of costs which addresses the treatment of directly assignable costs, directly attributable costs, indirectly attributable costs, unattributable costs, intra-company loans and taxes;
- 2) transaction with affiliates which addresses the treatment of transaction between the electric division and the telecommunications division such as asset acquisition and provision of services,
- 3) balance sheet accounting which addresses the appropriate accounting treatment for all such items,
- 4) accounting for revenue and expenses which addresses the appropriate accounting for all such items,
- 5) code of conduct which addresses regulatory compliance, treatment of similarly situated parties, use of customer information, billing and collecting for telecommunication services, inserts in bills, separate telephone numbers for the electric and telecommunications divisions, anti-competitive inducements, sales references by utility personnel, joint marketing of regulated and non-regulated services, loan and credit guarantees and other general code of conduct provisions,
- 6) reporting requirements which detail the specific information to be reported annually to the TRA.

The agreed terms also state that EPB shall provide access to the books, accounts, memoranda, contracts and records of the electric system and the telecommunications division and any other affiliated company upon request by the Authority. Provisions for internal and independent audits are also addressed in the proposed conditions and EPB will provide the results of any such audits to the Authority. Finally, EPB will provide the Authority access to company personnel to respond to inquiries and shall submit any reports required by the Authority.

POST HEARING

This matter was brought before the Authority on January 12, 1999, for a decision on the merits of EPB's Application. Prior to the deliberations, however, counsel for EPB announced that certain circumstances relative to and relied upon by EPB in support of its Application had changed since the conclusion of the hearing and the closing of the evidentiary record. As a result of EPB's announcement, the Authority postponed a decision on the merits and appointed Chairman Melvin J. Malone as Hearing Officer to determine the status of this case.

At a Status Conference convened without objection of the parties and held on January 12, 1999, it was determined that the following circumstances, as announced by EPB's counsel, were not part of the evidentiary record in this matter:

1. Globe had canceled its contract with EPB for assistance in purchasing and/or leasing telecommunications equipment, the provisioning of training for EPB employees and the development of EPB's fiber optic network on or about December 31, 1998;³

2. Globe reinstated its contractual relationship with EPB in some form prior to the January 12, 1999, Authority Conference, but communicated to EPB that Globe retained the right to sever the relationship before January 31, 1999, and in any event, would take a "lesser role" than that contemplated under the contract between Globe and EPB that had been made a part of the evidentiary record herein; and

³ Tenn Code Ann. § 65-4-201(c)(1) requires that an applicant for a Certificate of Public Convenience and Necessity to provide telecommunications services must possess "sufficient managerial, financial and technical abilities to provide the applied for services." In EPB's Restated Application, Globe is referenced in the sections on managerial fitness and technical fitness. Moreover, Mr. Robert Nyswaner of Globe filed pre-filed testimony in this matter and testified at the hearing in support of the Application. The contract between EPB and Globe was also submitted in support of EPB's Application.

Although Mr. Carriger contended on January 12, 1999, that EPB met the technical fitness requirement of Tenn Code Ann. § 65-4-201(c)(1) regardless of any external contractual arrangements, neither the Application nor the testimony produced at the hearing support this contention.

3. Mr. Robert Nyswaner, a former Globe employee who was originally retained by EPB as a consultant is involved in the process of becoming a permanent full-time employee of EPB.⁴

Under these circumstances, the Hearing Officer concluded that the evidentiary record did not reflect EPB's current governing factors on which a decision must be based. The Hearing Officer therefore determined that EPB should file supplemental testimony and that all parties should be given the opportunity to rebut the same. It was also determined that after the filing of testimony, absent a request for a hearing from any party, the parties were required to submit an Agreed Order permitting the entry of the supplemental and rebuttal testimony into the evidentiary record.⁵

Subsequently, on January 19, 1999, EPB filed the Amendment to its Application. After the filing of testimony and EPB's Amendment, none of the intervenors requested a hearing. On January 25, 1999, TCTA and EPB filed a Proposed Condition to the Certificate of Public Convenience and Necessity Relative to Contractual Arrangements.⁶ An Agreed order was filed on January 27, 1999.

The Directors of the Authority considered this matter on the merits at a regularly scheduled Authority Conference held on February 2, 1999. At that Conference, the Authority granted EPB's Application based upon the following findings of fact and conclusions of law:

⁴ On April 21, 1999, EPB notified the Authority by letter dated April 19th that Mr. Nyswaner, effective as of the date of the correspondence, had joined EPB as the Senior Vice President of Telecommunications.

⁵ The Agreed Order would also address any documents submitted with the supplemental information or rebuttal testimony that was not already a part of the evidentiary record in this matter

⁶ The parties agreed that as a condition to the grant of a CCN, any agreements between EPB, (on behalf of its Telecommunications Division) and any other entity "which provides for the joint ownership or joint ownership of control of assets, *[together with]* the sharing of profits and losses, or the sharing of *[gross]* revenues" would require approval of the Authority

I. APPLICANT'S QUALIFICATIONS

1. EPB is a Board of the City of Chattanooga, Tennessee, a Tennessee municipal corporation. EPB was originally created under Chapter 455 of the Private Acts of the 1935 Tennessee General Assembly and currently provides retail electric power to both business and residential customers in the City of Chattanooga, most of Hamilton County, as well as parts of Bledsoe, Bradley, Marion, Rhea and Sequatchie Counties in Tennessee, and parts of Catoosa, Dade and Walker Counties in Georgia.

2. EPB's principal place of business is located at 536 Market Street, Chattanooga, Tennessee, 37402. The phone number is (423) 265-2000 and the fax number is (423) 756-5861.

3. To demonstrate its financial capability to provide the proposed services, EPB provided the financial statements for fiscal years ending June 30, 1997 and 1998. Further, EPB's Board of Directors have demonstrated their commitment in assisting and supporting EPB's telecommunications success by their approval of a ten million dollar (\$10,000,000) interdivisional loan. Therefore, based upon the financial data presented herein, the Authority concludes that EPB possesses the financial ability to provide the services it proposes to offer.

4. With respect to EPB's managerial and technical ability, compelling evidence was presented to demonstrate that EPB possesses a very seasoned management staff. The record also demonstrates that EPB has been effectively managing its 153,000 customer business for sixty (60) years, and that the company currently employs sophisticated technical systems in the provision of its electric utility services. EPB has also retained the services of an independent telecommunications consulting group, as well as Robert Nyswaner, who possesses twenty-five (25) years of telecommunications experience. The Authority concludes that EPB possesses the

requisite expertise to provide the applied for services, based upon the foregoing demonstration of managerial fitness and technical ability.

5. EPB has represented that it will adhere to all applicable policies, rules and orders of the Authority.

6. The record in this cause demonstrates that EPB is currently authorized to provide telecommunications services in Georgia.

II. PROPOSED SERVICES

1. EPB intends to provide a full range of telecommunications services as typically provided by an incumbent local exchange telephone company including, but not limited to, dedicated and switched access services, private line services, local dial tone, 911 services and enhanced services. EPB may augment its service offerings in the future and add new services and capabilities as they become available from the Incumbent Local Exchange Carrier ("ILEC").

2. EPB intends to operate as a facilities-based local exchange provider, initially utilizing excess capacity on its fiber optics network and supplementing its services by reselling services of the ILEC. EPB also intends to provide directory assistance, dual party relay service, directory listing and access to 911 emergency services.

3. EPB does not intend to serve any areas currently being served by an incumbent local telephone company with fewer than 100,000 total access lines, as proscribed by Tenn. Code Ann. § 65-4-201(d), unless and until that statute and the Authority's orders enforcing that statute are preempted by law.

4. On behalf of its Telecommunications Division, EPB will not contract or enter into any agreement with another entity that provides for the joint ownership or joint control of assets, the sharing of profits and losses, or the sharing of revenues until the Tennessee Regulatory

Authority approves such contract or agreement on petition and after notice and opportunity to be heard has been extended to interested parties. This provision shall not apply to any service or transaction which is not subject to regulation by the Tennessee Regulatory Authority.

III. PUBLIC CONVENIENCE AND NECESSITY

Upon a review of the Application and the record in this matter, the Authority finds that approval of EPB's application would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services market in the State and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

IV. SMALL AND MINORITY-OWNED TELECOMMUNICATIONS BUSINESS PARTICIPATION PLAN & BUSINESS ASSISTANCE PROGRAM

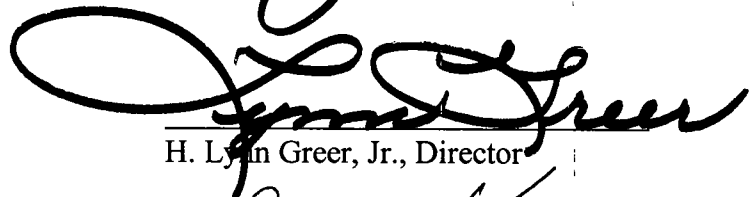
1. EPB has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and the Authority's Rules.

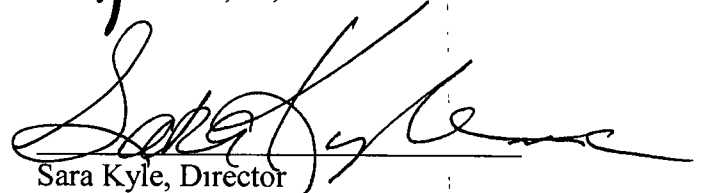
2. EPB has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-213.

IT IS THEREFORE ORDERED THAT:

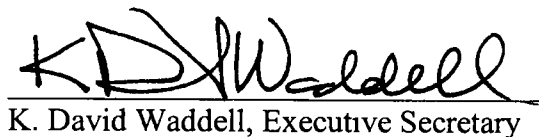
1. The Application of Electric Power Board of Chattanooga is approved; and
2. Any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.


Melvin J. Malone, Chairman


H. Lynn Greer, Jr., Director


Sara Kyle, Director

ATTEST:


K. David Waddell, Executive Secretary